Supreme Court, U.S.
FILED

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Case No.: _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ALTON PLATT, LAUREN WRIGHT, CARLENE SMITH, KENNETH HURT and JIHAD MUHAMMAD, on their own behalf and on behalf of all others similarly situated.

Petitioners

v.

THE STATE OF INDIANA, EVAN BAYH, individually and in his capacity as Governor of Indiana, THE CONSOLIDATED CITY OF INDIANAPOLIS and COUNTY OF MARION, STEPHEN GOLDSMITH, individually and in his capacity as Mayor of the Consolidated City and County of Indianapolis and Marion, THE CITY-COUNTY COUNCIL OF THE CONSOLIDATED CITY OF INDIANAPOLIS AND COUNTY OF MARION, individually, and in their capacities as members of the City-County Council of the Consolidated City and County of Indianapolis and Marion, THE MUNICIPAL COURT OF MARION COUNTY, THE SUPERIOR COURT OF MARION COUNTY, THE MARION COUNTY PUBLIC DEFENDER AGENCY, and THE MARION COUNTY PUBLIC DEFENDER BOARD, Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Stephen Laudig, Indiana Supreme Court Id. 8802-49
156 East Market St. #600
Indianapolis, IN 46204
Tel 317-637-6071

QUESTION PRESENTED FOR REVIEW

1. Do the Petitioners, who are indigent Accuseds, state a civil cause of action to enforce, in a civil rights proceeding for injunctive relief prior to judgment in the criminal proceeding, their Sixth Amendment right to effective assistance of counsel in the preparation of their defense?

LIST OF ALL PARTIES TO THE PROCEEDINGS

The names of all the parties to the proceedings in the Supreme Court of Indiana are included in the caption. In compliance with Rule 29 it is noted that there are no parent companies or subsidiaries of any corporations involved in this matter.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
INDIANA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioners Alton Platt, Lauren Wright, Carlene Smith, Kenneth Hurt and Jihad Muhammad respectfully seek a writ of certiorari to review the decision of the Indiana Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals is published in Platt v. State of Indiana, 664 N.E.2d 357 (Ind. App. 1996) and is reproduced in the Appendix beginning at page 1. The ruling granting the motion to dismiss the Third Amended Complaint by the Trial Court is reproduced in the Appendix beginning at page

BASIS FOR JURISDICTION

The petition for a writ of certiorari seeks review of the Indiana Court of Appeals decision and the decision of the Indiana Supreme Court to not accept transfer of the Petitioners' Petition to Transfer. The decision of the Indiana Supreme Court of 26 November 1996 to not accept transfer makes the Indiana Court of Appeals judgment final.

Jurisdiction is conferred upon the United States Supreme Court by 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Sixth Amendment to the United States Constitution states, in its pertinent part, that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Fifth Amendment to the United States Constitution, states, in its pertinent part, that:

> No person shall be . . . deprived of life, liberty, or property, without due process of law;

The Fourteenth Amendment to the United States Constitution, states, in its pertinent part, that:

> No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a class action brought under, among other statutes, 42 U.S.C. 1983 by Petitioner Alton Platt and other Petitioners. The suit alleged the following.

All petitioners are indigent persons accused of having

committed crimes and all have court appointed counsel. Mr. Platt was arrested on January 13, 1991 and charged with having committed felonies. He was unable to make bond. The Marion County (Indianapolis) Indiana Superior Court appointed counsel to represent him on January 15, 1991. On that date Platt met his appointed counsel for the first time. They communicated for less than sixty (60) seconds. Over the next nine (9) months Platt had three (3) communications with counsel. Each lasted less than sixty (60) seconds. Counsel refused to accept Platt's collect phone calls from jail, did not answer his letters and never visited him in jail prior to the filing of the complaint in this suit. Counsel did not discuss the case with Platt and did not interview any potential witnesses or prepare any possible defenses to the charge. There was no investigation and no pretrial motions. No effective defense was prepared. The other named plaintiffs were all charged with felonies either in Superior Court or Municipal Court and had similar experiences with their appointed counsel.

In Marion County more than eighty percent (80%) of all persons charged with crimes in the Criminal Court; more than

10,000 persons charged with crimes in the Marion County Municipal Court (which handles lesser felonies and misdemeanors); and, more than 2,500 juveniles charged in the Juvenile Division have counsel appointed for their defense. Counsel representing indigent accuseds do not satisfy the minimum constitutional obligations of providing adequate defense to indigent criminal defendants and juveniles. Each Judge hires private attorneys to provide legal representation for indigent accuseds. They are paid out of the Court's budget. The decision on whether to hire a particular attorney as a public defender is based upon that attorney's personal, or partisan, relationship with the judge. Counsel is hired on a political party basis. They receive clients on a rotating basis. There is no upper limit on the number of cases. Compensation does not vary with the number of cases assigned, or amount of time and effort expended. Counsel are "part-time" and have private civil and criminal law practices which compete for their time and attention. There are no paid staff investigators, secretaries, or paralegals. Counsel fees are inadequate, and along with the lack of defense services, prevent effective representation to indigent defendants.

Counsel have insufficient time to consult with their clients. The relationship between the Judges and counsel is one of employer-employee and creates both an appearance and an actual conflict of interest in that appointed counsel must vigorously represent their clients in front of the same person who can fire them. There is a direct and immediate disincentive to do anything that would displease a Judge. The Municipal Court Presiding Judge hires and fires the "Chief Public Defenders" and their Deputies and has engaged in partisan politically-based patronage hiring and firing practices for attorneys and staff.

The Petitioners alleged in their complaints that there was intentional underfunding of indigent defense to the extent that an adequate assistance of counsel, prior to conviction, was not provided. The cumulative effect of the inadequacies in the provision of indigent criminal defense in Marion County constitutes a systemic failure to satisfy minimum constitutional standards of the Fifth, Sixth and Fourteenth Amendments.

The Petitioners further alleged a gross disparity between the resources for the prosecution of, as compared to the defense, of

indigent accuseds which precludes a fair trial. The present condition of the indigent defense system has existed for more than twenty (20) years and has been studied and reported upon at least six (6) times since 1976. Each of the studies was referred to in the complaint and the studies findings formed part of the factual allegations of systemic ineffective assistance of counsel and the need for prevention.

Those reports are: 1) An Analysis of Indigent Defense Services In Marion County (Indianapolis) Indiana; ("1976 Report"); 2) Report No. 80-8, The Public Defender System of Marion County, Indiana: Current and Projected Costs; ("1980 Report"); 3) Report to Marion County Municipal Court Nominating Commission, RE: Municipal Court Public Defender Office; Evaluation of Partial State Funding for Public Defender Services in Indiana ("1985 Report"); 4) 1986 Statewide Study of Public Defender Services ("1986 Report"); 5) Marion County (IN) Municipal Court Public Defender and Probation Departments: First Report of Court Management Review Phase II ("1989 Report"); and, 6) Report of the Commission on Public Defenders of the

Indianapolis Bar Association ("1991 Report").

The 1976 Report revealed that the 1976 public defender system was, in all significant details, the same as it was at the time this action was filed. The 1980 Report found that the "Marion County system [fell] short of most of the ABA standards" relating to providing criminal defense services." Appointed counsel lacked professional independence; support services and training; adequate funding; and had a politics-ridden selection of chief defender and staff process. The 1985 Report noted that there was a lack of continuity of counsel; a lack of independence from the judiciary; a failure to interview clients prior to trial; inadequate preparation of cases for trial; insufficient supervision, training and support services; and inadequate funding. The 1986 Report concluded there was a lack of public defender independence from the judiciary; a lack of support services and money for investigation and experts; and, a lack of controls on the caseloads of individuals. The 1989 Report noted that the Municipal Court Public Defender office lacked most of the characteristics of an effective organization; in "most instances the public defender will not see a defendant's file after the first trial

hearing until a few minutes before the rescheduled trial date"; that "many . . . clients become lost in the system unless they contacted the public defender's office by collect call"; and that most appointed counsel left an "impression of apathy, and not infrequently antipathy to defendants." The 1991 Report by the Indianapolis Bar Association "arrived at a unanimous conclusion that the present fragmented system of delivery of public defender services to the indigent in Marion County is seriously deficient"; "the caseloads of public defenders clearly indicate that indigent defense services are seriously underfunded"; and, that "public defenders presently handle two-to-three times the number of cases recommended in national standards for public defender caseloads."

Trial Court

On April 10, 1992 the Petitioners filed a Class Action complaint. The Petitioners filed a Second Amended Complaint on September 2, 1993 which alleged all of the allegations contained in the "Statement of the Case Portion" of this Petition for Certiorari. The Petitioners alleged systematic violations of their Sixth Amendment right to effective assistance of counsel; Fifth

Amendment Due Process of law; and their Fourteenth Amendment right to equal protection of the law in their complaint. Petitioners filed a Motion for Partial Summary Judgment which included the reports noted above. The Defendants move to Dismiss the Second Amended Complaint for failure to state a claim upon which relief could be granted. The Trial Court entered an order granting the Motions to Dismiss for failure to state a cause of action.

Indiana Court of Appeals

On 16 April 1996 the Indiana Court of Appeals, Fifth District, upheld the Trial Court's dismissal, holding that under no set of facts could Petitioners be granted relief. The Court of Appeals held that "a violation of a Sixth Amendment right will arise only after a defendant has shown he was prejudiced by an unfair trial" (App. 6) that the Petitioners' claims were "not reviewable under the Sixth Amendment." (App. 6).

Indiana Supreme Court

On 26 November 1996, in a one sentence opinion, the Indiana Supreme Court denied transfer. Thus affirming the Court of Appeals decision. This petition for certiorari is being filed less than

ninety (90) days after that ruling. (S.C. Rule 13(1)) The 90th day is 25 February 1997.

REASONS FOR GRANTING THE WRIT

1. A state court of last resort has decided an important federal question in a way that conflicts with the decision of a United States Court of Appeal (S.C. Rule 10(b))

The core federal constitutional claim in this litigation is the Sixth, Fifth, and Fourteenth Amendment rights of indigent accused to effective assistance of counsel prior to conviction and avoid being subjected to an unfair trial and conviction and then establish, post-conviction, that appointed counsel had not played "the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 685, 104 S.Ct 2052 (1988).

The right to counsel is "one of the safeguards deemed necessary to insure fundamental rights of life and liberty." Johnson v. Zerbst, 304 U.S. 458, 82 L Ed 1461, 58 S.Ct. 1019, (1937), at 462. It is the right to effective counsel. Mann v. Richardson, 397 U.S. 759, 25 L.Ed.2d 763, 90 S.Ct. 1441 (1970); Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct 792 (1963).

Strickland created "factual presumption" for accuseds claiming ineffective assistance of counsel to overcome in order to obtain a reversal of a conviction. Preventing, rather than remedying, ineffective assistance of counsel is an important federal question because of the loss of significant lost during the period of time after conviction and before reversal. Additionally a justice system must be seen to be fair for it to have the public's confidence..

The symptoms indicate systemic failure and have been noted to previously exist in Marion County Indiana. Smith v. State, 511 N.E.2d 1042 (1987) ("The reversal of this conviction may not have come about so much from an individual performance as from a flaw in the system maintained to provide legal counsel to those unable to meet the expense on their own."); Dubinion v. State, 600 N.E.2d 136, 138 (Ind. App. 1992) ("case vividly demonstrates the need for a dramatic and substantial revision of the Marion County Municipal Court system including most prominently the Municipal Court Public Defender system.") The trial court noted how widespread the crisis in indigent defense is nationwide. The Trial Court held in its July 8, 1994 entry at fn 2, that:

The inadequacy of the public defender system in Marion County, as alleged in the Complaint, is not a problem unique to Marion County

Before reversing a conviction under Strickland a court must be convinced that:

1) a deficient performance by counsel;
2) caused a sufficiently great prejudice to the defendant. Strickland at 694.

The Petitioners have an important federal right to prevent ineffective assistance of counsel before conviction because in addition to the above there is a strong presumption that trial counsel was adequate, that any errors which were made were conscious ones, and that the trial counsel's conduct was constitutionally adequate. Strickland at 690-91. The current standard is to determine, after conviction, whether there was constitutionally deficient ineffective assistance of counsel.

Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988), cert. den. 495 U.S. 957, 110 S.Ct. 2562 (1990) later Luckey v. Miller, 976 F. 2d 673 (11th Cir. 1992) recognized a civil cause of action to prevent ineffective assistance of counsel. Similarly Wallace v. Kern, 392 F.

Supp. 834 (E.D.N.Y 1972) rev'd on abstention grounds, 482 F.2d 621 (2d Cir. 1973) found that preconviction claims of ineffective assistance of counsel could be addressed on a class-action basis prior to conviction.

The Indiana Court of Appeals erroneously construed Strickland as meaning there is no civil right to prevent a Strickland violation from inevitably occurring.

Hence the Platt opinion directly conflicts with Luckey and Wallace.

2. A state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court (S.C. Rule 10(c))

The Constitution's guarantee of effective assistance of counsel to indigent accuseds cannot be satisfied by a mere formal appointment. Avery v. Alabama, 308 U.S. 444, 446, (1940). Kimmelman v. Morrison, 477 U.S. 365, (1986). "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary system." Id. at

374, and is the "right to effective assistance of counsel." Ibid. at 377. The "right to effective assistance of counsel is personal to the defendant, and is explicitly tied to a fundamentally fair trial - a trial in which the determination of guilt or innocence is "just" and "reliable." Ibid. (J. Powell, concurring) at 392-393.

When effective assistance of counsel is not provided the entire adversary system itself to suffers. McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974). Inadequate representation is "not a product of an adversary [process], but a flaw in the adversary process." Ibid. at 218-19.

The crisis in providing adequate assistance of counsel, prior to conviction, is not restricted to Marion County but is a nationwide problem of long standing and it is worsening. Piecemeal after the fact remedy of reversing convictions is ineffective when the problem is the system. See State v. Peart, 621 So.2d 780 (La. 1993); The Crisis In Indigent Criminal Defense, 44 Ark. L.R. 235 (1991); A Noble Ideal Whose Time Has Come, 18 Memphis State U. L.R. 223. (1991); [Un]Luckey v. Miller: The Case for A Structural Injunction to Improve Indigent Defense Services, 101 Yale L. J.

481 (1991); Gideon v. Wainwright Revisited, 10 Pace L.R. Review 327 (1990); The Right to Effective Counsel:, 16 T. Marshall L.R. 225 (1990); Keeping Gideon from Being Blown Away: Prospective Challenges to Inadequate Representation May be Our Best Hope, 4 Criminal Justice 10 (Winter 1990); Resource Deprivation and the Right to Counsel, 80 Journal of Criminal Law & Criminology No. 3 673 (1989); We Are Still Not Defending the Poor Properly, Criminal Justice Fall 1989; The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform, 29 Boston College L.R. 531 (1988); The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, 13 Hastings Const. L.Q. 625 (1986); Why We are Not Defending the Poor Properly, Criminal Justice Fall 1986; State ex rel. Stephan v. Smith, 242 Kan. 336, 747 P.2d 816 (Kan. 1987); Unequal Justice Under Law; An Analysis of Indigents in the Criminal Justice System — The Indiana Experience , 6 W. New Eng. L. Rev 263 (1983); State v. Robinson, 123 N.H. 665, 465 A.2d 1214 (N.H. 1983); Arnold v. Kemp, 306 Ark. 294, 813 S.W.2d 770 (Ark. 1991).

This important federal question of preconviction of effective assistance of counsel gathers heightened importance in light of the restrictions on habeas corpus enacted recently.

The Courts, since the governmental officials involved are officers of the court and the harm effects the judicial system are uniquely qualified to act and not defer to the executive or legislative branches for a remedy.

As Chief Justice Burger noted surely "an effective system of justice is as important to the social, economic and political health of the country as an adequate system of medical care is to our physical health." C.J. Burger, Has the Time Come?, 55 F.R.D. 119, 123 (1972).

CONCLUSION

WHEREFORE, Petitioners request this court to grant their petition for certiorari to the Indiana Court of Appeals and for all other proper relief.

Respectfully Submitted this 21 February 1997.

Stephen Laudig

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APPENDIX

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COURT OF APPEALS OF INDIANA-FIFTH DISTRICT

ALTON PLATT, LAUREN WRIGHT, CARLENE SMITH, KENNETH HURT and
JIHAD MUHAMMAD, on their own behalf and on behalf of all others similarly situated,

Appellants-Plaintiffs,

vs.

THE STATE OF INDIANA, EVAN BAYH, individually and in his capacity as Governor of Indiana, THE CONSOLIDATED CITY OF INDIANAPOLIS and COUNTY OF MARION, STEPHEN GOLDSMITH, individually and in his Capacity as Mayor of the Consolidated City of Indianapolis and County of Marion, and the CITY-COUNTY COUNCIL OF THE CONSOLIDATED CITY OF INDIANAPOLIS AND COUNTY OF MARION, individually, and in their capacities as members of the City-County Council of the Consolidated City of Indianapolis and County of Marion, THE MUNICIPAL COURT OF MARION COUNTY, THE SUPERIOR COURT OF MARION COUNTY, THE MARION COUNTY PUBLIC DEFENDER AGENCY, and THE MARION COUNTY PUBLIC DEFENDER BOARD,

Appellees-Defendants.

No. 49A05-9411-CV-432

COURT OF APPEALS OF INDIANA, FIFTH DISTRICT

664 N.E.2d 357; 1996 Ind. App. LEXIS 447

April 16, 1996, Filed

Appellant's Transfer Denied November 26, 1996.

PRIOR HISTORY: APPEAL FROM THE MARION COUNTY SUPERIOR COURT. CIVIL DIVISION ROOM FIVE. The Honorable Christopher L. Burnham, Special Judge Presiding. Cause No. 49D05-9204-CP-378.

DISPOSITION: Affirmed.

COUNSEL: FOR APPELLANT: STEPHEN LAUDIG, Laudig & George, Indianapolis, Indiana.

FOR APPELLEE: DALE SIMMONS, City Legal Department, Indianapolis, Indiana. Attorney for all County Defendants: PAMELA CARTER, Attorney General of Indiana, ANTHONY W. OVERHOLT, Deputy Public Defender, Indianapolis, Indiana, Attorney for State Defendants.

JUDGES: STATON, Judge, HOFFMAN, J., and GARRARD, J., concur.
OPINIONBY: STATON
OPINION:
STATON, Judge

Alton Platt, Lauren Wright, Carlene Smith, Kenneth Hurt, and Jihad Muhamad, on their own behalf and on behalf of all others similarly situated, n1 appeal the order of the trial court dismissing their second amended complaint in this action. Platt raises four issues for appellate review, which we reorder and restate as follows:

----------Footnotes----------

n1 To avoid confusion, we will refer to the class of plaintiffs collectively as "Platt." Class certification in this action was never addressed by the trial court.

----------End Footnotes----------

I. Whether the trial court properly applied the law of the case doctrine in dismissing Platt's claims against defendants.

II. Whether the system of providing legal defense to indigent

criminal defendants in Marion County is constitutionally inadequate.

III. Whether the system of providing legal defense to indigent criminal defendants is racially discriminatory and thus violates the Equal Protection Clause.

IV. Whether the ordinance creating the Marion County Public Defender Board and the Marion County Public Defender Agency violates the separation of powers doctrine.

We affirm.

The facts most favorable to Platt reveal that on April 10, 1992, Platt filed a lawsuit challenging the constitutionality of the Marion County Public Defender System and seeking mandatory injunctive relief. The original complaint named as defendants the State of Indiana, Governor Evan Bayh, the City of Indianapolis and Marion County, Indianapolis Mayor Stephen Goldsmith, and the City-County Council. On November 6, 1992, the trial court dismissed the complaint, concluding that the named defendants did not have "the requisite power, authority, jurisdiction, ability or legal duty" to provide the relief sought by Platt. Supp. Record, p. 9. This dismissal was not appealed.

Thereafter, Platt twice amended the complaint to add additional defendants, so the case at bar also includes the Marion County Superior and Municipal Courts, the Marion County Public Defender Agency, and the Marion County Public Defender Council. The second amended complaint was in fourteen counts, but stated in essence three constitutional claims: (1) that indigent criminal defendants in Marion County receive constitutionally inadequate legal representation; (2) that the public defender system in Marion County is racially discriminatory, violating the Equal Protection Clause of the Fourteenth Amendment; and (3) that Marion County Public Ordinance Number 9, which created the Public Defender Agency and the Public Defender Board, violates constitutionally mandated separation of powers.

On July 8, 1994, the trial court dismissed the second amended complaint on the ground that the law of the case doctrine barred Platt's original claims against the original defendants, due to the previous dismissal of the first complaint. The trial court further concluded that as to all but Count Fourteen of the second amended complaint, Platt stated no claim for relief. With regard to Count Fourteen, the court ordered Platt to file an amended complaint within thirty days. Platt failed to do so and on April 4, 1995, the trial court dismissed Count Fourteen, thus determining all issues in this matter. See Second Supp. Record, p. 3. Platt appeals the dismissal order.

In determining whether a complaint should be dismissed for failure to state a claim, facts alleged in the complaint must be taken as true. Dismissal is appropriate only where it appears that under no set of facts could plaintiffs be granted relief. Morton-Finney v. Gilbert, 646 N.E.2d 1387, 1388 (Ind. Ct. App. 1995), trans. denied.

I.

Law of the Case

We must first address the issue of whether the law of the case doctrine was properly applied to bar the original claims against the original defendants that were dismissed by court order in 1992. The law of the case doctrine stands for the proposition that:

Facts established at one stage of a proceeding, which were part of an issue on which judgment was entered and appeal taken, are unalterably and finally established as part of the law of the case and may not be relitigated at a subsequent stage. Otte v. Otte, 655 N.E.2d 76, 83 (Ind. Ct. App. 1995), reh. denied, trans. pending (quoting Landowners v. City of Fort Wayne, 622 N.E.2d 548, 549 (Ind. Ct. App. 1993), reh. denied). The application of this doctrine is discretionary, and despite its availability, courts retain the power to revisit their prior decisions or those of a coordinate court in any circumstance, "although as a rule courts should be loathe to do so in

the absence of extraordinary circumstances." Otte, supra, 655 N.E.2d at 83-84 (citing Landowners, supra, at 549).

In this case, the trial court dismissed the original claims based on Ind. Trial Rule 12(B)(6), concluding that Platt's complaint failed to state a claim upon which relief could be granted. After Platt twice amended his complaint, the trial court dismissed the original claims as to the original defendants, concluding that the prior dismissal constituted the law of the case, and barred the similar claims in the second amended complaint.

Whether the law of the case doctrine is applicable to allegations in an amended complaint filed after a T.R. 12(B)(6) dismissal has never been addressed by the courts of this jurisdiction. However, this issue can be resolved by examining the effect of a dismissal pursuant to T.R. 12(B)(6). T.R. 12(B)(6) provides that a defendant may file a motion to dismiss for failure to state a claim upon which relief can be granted. The rule further provides in relevant part that "when a motion to dismiss is sustained for failure to state a claim under subdivision (B)(6) of this rule the pleading may be amended once as of right . . ." T.R. 12(B).

When a party exercises his automatic right to amend pursuant to this rule, the amended pleading replaces the original pleading for all purposes, and all rights to appeal the original dismissal are lost. Anderson v. Anderson, 399 N.E.2d 391, 406, n.30 (Ind. Ct. App. 1979)(citing McKenna v. Turpin, 128 Ind. App. 636, 151 N.E.2d 303 (1958)). Accordingly, a T.R. 12(B)(6) dismissal is without prejudice, since the complaining party remains able to file an amended complaint within the parameters of the rule. A T.R. 12(B)(6) dismissal becomes an adjudication on the merits only after the complaining party opts to appeal the order instead of filing an amended complaint. See Browning v. Walters, 616 N.E.2d 1040, 1044 (Ind. Ct. App. 1993) modified on other grounds, 620 N.E.2d 28 (by electing to appeal a dismissal order instead of filing an amended complaint, the plaintiff rendered the trial court's dismissal order an adjudication on the merits).

With this in mind, we now consider the trial court's application of the law of the case doctrine to the circumstances at bar. The law of the case doctrine requires the presence of "facts established at one stage of a proceeding, which were part of an issue on which judgment was entered and appeal taken . . ." Otte, supra, at 83. Because a T.R. 12(B)(6) dismissal order is not final and appealable once an amended complaint is filed, it involves neither facts nor issues on which judgment was entered or appeal taken. Therefore, such order should not have the preclusive effect that the application of the law of the case doctrine would give it. As a result, the trial court erred when it relied upon the law of the case doctrine as a basis for dismissing Counts I through XII of Platt's second amended complaint.

Nevertheless, in the interest of judicial economy, rather than remanding this case based upon the trial court's erroneous application of the law of the case to the first twelve counts of Platt's complaint, we will address the merits of the first twelve counts of the complaint as well as the merits of the dismissal of Counts XIII and XIV as these issues are fully briefed.

II.

Constitutionally Inadequate Defense

Platt contends that the trial court erred in denying his petition to enjoin the Marion County public defender system because it is inadequate under both the United States and Indiana Constitutions.

The granting or refusing of injunctive relief is a matter within the sound discretion of the trial court. Oakes v. Hattabaugh, 631 N.E.2d 949, 953 (Ind. Ct. App. 1994), reh. denied, trans. denied. A mandatory or prohibitory injunction is an extraordinary equitable remedy which should be granted with caution. Id. The plaintiff carries the burden of demonstrating injury which is certain and irreparable if the injunction is denied. Campbell v. Spa le, 617

N.E.2d 580, 583 (Ind. Ct. App. 1993). In making its decision, the trial court must weigh whether the plaintiff has an adequate remedy at law and the court must consider whether an injunction is in the public interest. Id. The trial court's grant or denial of injunctive relief will not be overturned unless it is arbitrary or amounts to an abuse of discretion. Id.

Platt argues that the Marion County public defender system is constitutionally inadequate under the Fifth (right to due process of law), Sixth (right to assistance of counsel), and Eighth Amendments (right to reasonable bail) to the United States Constitution and Art. I, @@ 12 (right to due course of law), 13 (right to counsel), 16 (right to nonexcessive bail), 17 (right to bail), and 18 (penal code founded on reformation not vindictive justice) of the Indiana Constitution and therefore, should be enjoined.

The focal constitutional claim Platt raises is that the existing public defender system violates his fundamental right to effective pretrial assistance of counsel under the Sixth Amendment to the United States Constitution n2 and Art I, @ 13 of the Indiana Constitution. n3 Platt raises his claims under the Fifth Amendment, the Eighth Amendment, and the due process clause of the Fourteenth Amendment in the context of the Sixth Amendment right to effective assistance of counsel, so we need not address each of these provisions individually. Platt addresses his arguments under the provisions of the Indiana Constitution in the same manner. Thus, our review of Platt's ineffective assistance of counsel claim under the Sixth Amendment encompasses all the constitutional arguments he raises. However, we address Platt's claim under the Equal Protection Clause of the Fourteenth Amendment separately. See Issue III, infra.

----------Footnotes----------

n2 The Sixth Amendment provides, "In all criminal prosecutions. the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

n3 Art. 1, @ 13 provides, "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel."

----------End Footnotes----------

Platt contends that the system for providing legal counsel for indigents in Marion County lacks sufficient funds for pretrial investigation and preparation which inherently causes ineffective assistance of counsel at trial. Platt argues that this insufficiency cannot be cured by an appellate claim of ineffective assistance of counsel in light of the heavy burden of error the appellant must show under Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). n4

----------Footnotes----------

n4 Because the Indiana Supreme Court has applied the test set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), our analysis under Strickland is applicable to both his Sixth Amendment and Art. I, @ 13 claims. See Bellmore v. State, 602 N.E.2d 111, 123 (Ind. 1992), reh. denied; Resnover v. State, 507 N.E.2d 1382, 1385 (Ind. 1987), cert. denied, 484 U.S. 1036, 98 L. Ed. 2d 779, 108 S. Ct. 762 (1988).

----------End Footnotes----------

In Strickland, the United States Supreme Court created a standard for assessing when a defendant has been deprived his right to effective assistance of counsel under the Sixth Amendment. There, the Court noted, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, supra, 466 U.S. at 686. A reversal for ineffective assistance of counsel is required when the defendant has shown: (1) that counsel's performance was deficient, i.e., that counsel made errors so serious that counsel was not functioning as "counsel"; and (2) that this deficient performance prejudiced the defense insofar as counsel's errors were so serious as to deprive the defendant of a fair trial. 466 U.S. at 687.

The right to effective assistance of counsel under the Sixth Amendment "is recognized not for its own sake, but because of the

effect it has on the ability of the accused to receive a fair trial." United States v. Cronic, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984). "Absent some effect of [the] challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." Id. Thus, any violation of the Sixth Amendment must be reviewed in the context of the whole trial process, as the determination of the effectiveness of counsel is whether the defendant had the assistance necessary to justify reliance on the outcome of the proceeding. Strickland, supra, at 692. A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. 466 U.S. at 690.

Here, Platt seeks to enjoin the Marion County public defender system because it effectively denies indigents the effective assistance of counsel. However, a violation of a Sixth Amendment right will arise only after a defendant has shown he was prejudiced by an unfair trial. This prejudice is essential to a viable Sixth Amendment claim and will exhibit itself only upon a showing that the outcome of the proceeding was unreliable. Id. Accordingly, the claims presented here are not reviewable under the Sixth Amendment as we have no proceeding and outcome from which to base our analysis. n5

----------Footnotes----------

n5 The Minnesota Supreme Court recently addressed an analogous claim. See Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996). There, the court determined that the district court erred in granting a public defender's motion for summary judgment on the ground that the public defender services in his district were underfunded and thereby, failed to render effective assistance of counsel in accordance with the Sixth Amendment. Reversing the district court's judgment, the Minnesota Supreme Court indicated that the public defender's claim was too speculative and hypothetical in that the public defender had failed to present any evidence that his clients were denied the effective assistance of counsel. Id. at 6-8. Because the public defender failed to show any "injury in fact", the court rejected his request for judicial intervention. Id. at 8.

----------End Footnotes----------

Moreover, a court of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. O'Shea v. Littleton, 414 U.S. 488, 499, 38 L. Ed. 2d 674, 94 S. Ct. 669 (1974)(quoting Younger v. Harris, 401 U.S. 37, 43-44, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)). In assessing a claim in federal court for equitable relief for constitutional violations arising from state law, the Court instructed lower courts to exercise "restraint against the issuance of injunctions against state officers engaged in the administration of the State's criminal laws in the absence of a showing of irreparable injury which is 'both great and immediate.'" Id. (quoting Younger, supra, at 46).

Here, Platt has an adequate remedy at law should he be adjudged guilty of the crimes charged and not provided the effective assistance of counsel. First, any defendant may take an appeal to the Indiana Supreme Court or the Court of Appeals as a matter of right, from any judgment in a criminal action against him in the manner prescribed by law. Evolga v. State, 519 N.E.2d 532, 533 (Ind. 1988), reh. denied; IND. CODE @ 35-38-4-1 (1993); and see Art. 7, @ 8 of the Ind. Constitution. In that appeal, the court's decision or intermediate order made in the progress of the case may be reviewed. Id. Prior to doing so, Platt may also file a motion to correct error within thirty days of sentencing in accordance with Ind. R. Crim.P. 16.

In addition, Platt may file a petition for post-conviction relief under Indiana's post-conviction rules. See Ind. Post-Conviction Rule 1. Platt may then petition for a writ of habeas corpus relief to the appropriate federal district court. See 28 U.S.C.A. @ 2554 (West 1994). Finally, Platt can file a writ of mandamus, requiring the Marion County courts to provide for the appointment of a competent public defender as the trial court has a duty to do so under IND. CODE @@ 33-9-11-1 through 33-9-11-5 (1993). See State ex rel. Brumfield v. Perry Circuit Court, 426 N.E.2d 692 (Ind. 1981). See also State v. Allen Circuit Court, 238 Ind. 571, 153 N.E.2d 914 (1958) (trial court mandated to appoint pauper counsel

to represent defendant and furnish transcript at public expense as required by statute).

Because his claim under the Sixth Amendment is not yet ripe and because he has several adequate remedies available to him at law and will not suffer irreparable harm, Platt's petition for equitable relief is inappropriate. n6 Campbell, supra, at 583.

----------Footnotes----------

n6 Platt argues that in light of the strict standard Strickland requires to show ineffective assistance of counsel, he essentially has no adequate remedy at law. However, the United States Supreme Court has stated that the purpose of the Sixth Amendment is to "ensure a fair trial" and we are bound by the standard set forth in Strickland as the means for reviewing an alleged violation under the Sixth Amendment. See Strickland, supra, 466 U.S. at 686. Thus, we are compelled to conclude that the Strickland test is the means for testing a Sixth Amendment claim and we decline Platt's invitation to adopt a different standard here.

----------End Footnotes----------

III.

Equal Protection

Platt also contends that the trial court erred in dismissing Count XIII of his complaint in which he alleged that the Marion County Public Defender system is racially discriminatory, violating the Equal Protection Clause of the Fourteenth Amendment. n7

----------Footnotes----------

n7 The Fourteenth Amendment to the United States Constitution provides, "No State shall make or enforce any law which will abridge privileges and immunities of citizens of the United States; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

----------End Footnotes----------

In assessing a claim under the Equal Protection Clause, our first inquiry involves the applicable level of scrutiny. Laws which

involve a suspect classification, like race or alienage, and those that burden the exercise of fundamental rights, like reproduction or expression, receive the strictest scrutiny. Dept. of Envtl. Mgt. v. Chemical Waste Mgt., Inc., 643 N.E.2d 331, 337 (Ind. 1994). In order to survive strict scrutiny, a state action must be a necessary means to a compelling governmental purpose and be narrowly tailored to that purpose. Id.

Platt argues that "the evidence is so overwhelming of intentional neglect and underfunding of public defense that it is reasonable to conclude that the Defendants intended that poor people, generally, and African-Americans, in particular, charged with crimes, be provided inadequate assistance of counsel." Appellant's Br. at 45, (emphasis in original). Platt indicates that because at least 60% of the persons represented by public defenders in Marion County are African-Americans and only 25% of the population of Marion County is African-American, the clear intent of the County's public defender system is for African-Americans to receive ineffective assistance of counsel.

Platt cites Palmer v. Thompson, 403 U.S. 217, 29 L. Ed. 2d 438, 91 S. Ct. 1940 (1971) in support of his theory that this disparate impact is sufficient to show a violation of the Equal Protection Clause. In Palmer, the Court determined that the closing of public swimming pools following an order to desegregate on the ground that the pools could not be operated safely and economically on an integrated basis did not constitute a violation of the Equal Protection Clause. 403 U.S. at 225-226. There, the Court, in dicta, warned the judiciary of invalidating a law because "of bad motives of supporters" rather than for its facial content or effect. Id. at 225. From this, it has been construed, as Platt does here, that the disproportionate effect of a statute can violate equal protection.

Yet, the Court later rejected this reading of Palmer in Washington v. Davis, 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976), stating that "[Palmer] did not involve, much less invalidate, a statute or ordinance having neutral purposes but

disproportionate racial consequences." Washington, supra, at 243. Since Palmer, the Court has expressly held that proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. See Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273, 60 L. Ed. 2d 870, 99 S. Ct. 2282 (1979); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1976); Washington, supra, at 242.

In Washington, the Court opined:

> . . . We have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

426 U.S. at 242 (citation omitted). See also Steelman v. State, 602 N.E.2d 152, 157 (Ind. Ct. App. 1992) (proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause). Discriminatory purpose implies that the decision maker selected or reaffirmed a particular course of action at least in part "because of" not merely "in spite of," its adverse effects upon an identifiable group. Feeney, supra, 442 U.S. at 279. Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available. Arlington Heights, supra, at 266.

In his complaint, Platt alleges: (1) it is known and understood to the white majority on the City County Council that most of the persons represented by public defenders in Marion

County are African-Americans; (2) part of the reason that the white majority party on the City County Council has neglected to assure that legal counsel is provided to poor persons charged with crimes in Marion County is a racial animus or lack of concern about how African-Americans are treated by the criminal justice system; and (3) the systemic and funding deficiencies of the Indiana and Marion County criminal defense scheme for indigents violates the Plaintiffs', and the class they represent, rights guaranteed by the Fourteenth Amendment to be free from governmental policies which have a known racially discriminatory effect. See Record, pp. 836-837.

Arguably, Platt has presented evidence that the existing Marion County public defender system may negatively affect African-Americans. Yet, such an uneven effect will not give rise to constitutional concern unless the policy is an obvious pretext for discrimination against the suspect class. David K. v. Lane, 839 F.2d 1265, 1272 (7th Cir. 1988). Nevertheless, Platt urges this court to infer discriminatory intent from the alleged underfunding and neglect of the public defender system. Absent any evidence of intentional discrimination, this inference cannot give rise to proof of a Constitutional violation. See Feeney, supra, at 279, n. 25. Accordingly, we conclude that the facts as alleged in Count XIII of Platt's complaint are insufficient to support the claim that the Marion County public defender system was enacted and is operated with the purposeful intent of discriminating against African-Americans in violation of the Equal Protection Clause of the Fourteenth Amendment.

IV.

Separation of Powers

Finally, Platt contends that the Marion County Public Defender Agency and the Marion County Public Defender Board violate the constitutionally mandated separation of powers as set forth in Art. III, @ 1 of the Indiana Constitution. n8

----------Footnotes----------

n8 Article III, @ 1 provides:

The powers of the Government are divided into three separate departments: the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

----------End Footnotes---------- [**23]

The Indiana Supreme Court has set forth the following standard of review for assessing constitutional challenges:

> Legislation under constitutional attack . . . is clothed in a presumption of constitutionality. The burden to rebut this presumption is upon any challenger, and all reasonable doubts must be resolved in favor of an act's constitutionality. When a statute can be construed to support its constitutionality, such construction must be adopted . . . . Further, it is the challenger's burden to show that the alleged constitutional defects are clearly apparent. Matter of Tina T., 579 N.E.2d 48, 56-57 (Ind. 1991) (citation omitted).

Platt argues that the municipal ordinance establishing the Marion County Public Defender Agency and the Marion County Public Defender Board is violative of Art. III, @ 1 because it allows the City-County Council to make four appointments to the Public Defender Board and have final approval over the employment of the chief public defender. In addition, the ordinance allows the Presiding Judge of the Marion County Municipal Court and the Marion County Superior Court to make two appointments to the Board, and allows the Mayor to make one appointment. Platt contends that this makeup commingles the powers of the three branches rather than separates them as required by the Indiana Constitution. Platt points out that the Board functions exclusively within the judicial branch; yet, pursuant to the ordinance the legislative branch (City-County Council) has the power of appointment of Board members and the right of confirmation over the employment of the

chief public defender. Thus, Platt argues, this encroachment on the judiciary's power is violative of Art. III, @ 1.

In assessing challenges under the separation of powers doctrine, the Indiana Supreme Court has determined that statutes which divest the judiciary of its powers will violate Art. III, @ 1. See State ex rel. Kostas v. Johnson, 224 Ind. 540, 69 N.E.2d 592 (1946) (statute which divested a trial court of jurisdiction for failure to rule within a purported time excessive legislative interference in the judiciary). However, the court has determined that a statute which allows a local coordinating committee to review and recommend the restrictive placement of juveniles was not an attempt on the part of the legislature to supersede the power of the judiciary. See Matter of Tina T., supra, 579 N.E.2d at 57-59. There, the court also stated that allowing the director of the county welfare department, a member of the executive branch, to be a voting member of the committee did not violate the doctrine of separation of powers as well. The court noted, "The presence of one member of the executive branch of government on a multi-member committee which serves a purely advisory role to the judicial branch does not violate the separation of powers doctrine." 579 N.E.2d at 60.

The stated purpose of the Ordinance is to provide "legal representation to indigent defendants/respondents in criminal, juvenile, probation violation, extradition, child support, civil commitments and other proceedings where the right to counsel has been established by law." Supp. Record, p. 12. Some of its duties include: (1) providing competent legal representation for indigent defendants; (2) establishing guidelines and procedures for the determination of legal indigency; and (3) establishing policy and procedures for the efficient operation of the Agency.

The purpose and goal of the Ordinance is to establish a method for managing the Marion County public defender system; its operation does not infringe upon the judiciary's decision making process. Instead, this purely local ordinance is designed to

implement an efficient indigent counsel system to ensure that each defendant in Marion County is provided with his fundamental right to counsel. Construing the Ordinance with a presumption of constitutionality and absent any evidence that the effect of this Ordinance is to usurp judicial power, we cannot conclude that the facts as alleged in Count XIV of Platt's complaint demonstrate a violation of the doctrine of separation of powers required by Art. III, @ 1.

Affirmed.

HOFFMAN, J., and GARRARD, J., concur.

STATE OF INDIANA **MARION SUPERIOR COURT, CIVIL DIVISION, ROOM FIVE**

COUNTY OF MARION **CAUSE NO. 49D059204CP0378**

ALTON PLATT, LAUREN WRIGHT, and CARLENE SMITH, on their own behalf and on behalf of all others similarly situated.

Plaintiffs,

-vs-

THE STATE OF INDIANA, et al.,
Defendants.

RULING ON MOTIONS TO DISMISS PURSUANT TO T.R. 12(B)(6)

This Third Complaint is now the subject mater under consideration in light of the Defendants' Motions to Dismiss.

Two new parties were added as Defendants in the Third Complaint: (1) The Marion County Public Defender Agency; and (2) the Marion County Public Defender Board. The Third Complaint stated the same twelve causes of action as the original complaint; however, two new causes of action were stated: (1) the systemic and funding deficiencies of the Indiana and Marion County criminal defense scheme for indigents violated the Plaintiffs' rights guaranteed by the 14th and 15th Amendments to be free from governmental policies which have a known racially discriminatory effect; and (2) that the Marion County Public Defender Board fails to comply with the doctrine of separation of legislative, judicial and

executive powers by failing to exist within this constitutionally mandated structure.

. . .

The Defendants, in their motions and oral arguments at hearing, state that the *'law of the case'* doctrine governs this Court's decision at this stage of the proceedings. As stated in Citizens Action Coalition of Indiana, Inc. v. Public Service of Indiana, (1991) Ind., 582 N.E.2d 330, 334:

> That doctrine stands for the proposition that an appellate court's determination of a legal issue is binding in subsequent appeals given the same case and substantially the same facts, Cha v. Warnick (1985), Ind. 476 109, 114, and is "based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter." United States v. United States Smelting Refining & Mining Co., 339 U.S. 186, 198, 70 S.Ct. 537, 544, 94 L.Ed. 750, 760-61 (citations omitted)[1] **(Trial Court's footnote.)**

The 'law of the case' doctrine applies at the trial

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[1] *See also,* 626 N.E.2d 537 (Ind. App. 3 Dist. 1993) Rotec, Div of Orbitron, Inc. v . . .; 623 N.E.2d 445 (Ind. App. 1 Dist. 1993) Huffman v. Huffman; 622 N.E.2d 548 (Ind. App. 3 Dist. 1993) Certain Northeast Annexation Ar . . .; 609 N.E.2d 1145 (Ind. App. 2 Dist. 1993) Herrell v. Casey; 609 N.E.2d 1160 (Ind. App. 5 Dist. 1993) Haskell v. Peterson Pontiac GMC . . .; 596 N.E.2d 926 (Ind. App. 5 Dist) CNA Ins. Companies (CNA) v. Vel . . .

court stage of the proceedings as well. As stated in Cunningham v. Hiles (1982) Ind. App., 439 N.E.2d 669, 676:

> And so it is that facts established at one state of a proceeding which were part of an issue on which judgment was entered and appeal taken, unalterably and finally established as part of the law of the case, may not be relitigated at a subsequent stage. This is part of the law of the case principle. In this sense it is similar to res judicata in that it furthers a timely termination of disputes and avoids otherwise endless litigation. Hines v. McNair, (1980) Ind. App., 413 N.E.2d 586. Even if the judgment is erroneous, it is nevertheless becomes the law of the case and thereafter binds the parties unless successfully challenged on appeal. Oviatt v. Behme, (1958) 238 Ind. 69, 147 N.E.2d 897. Thus, all issues decided directly or by implication in a prior decision are binding in all further portions of the same case. In re Lemond, (1980) Ind., 413 N.E.2d 228; Stanrey Court v. Horizon Construction Inc., (1976) 168 Ind. App. 164, 342 N.E.2d 645; Deckard v. Mathers, (1972) 152 Ind. App. 440, 448, 284 N.E.2d 92, and other case (*sic*) cited at Cunningham v. Hiles, (1982) Ind. App., 435 N.E.2d 49, 52.

Further, as stated in Rotec, Div of Orbitron, Inc. v. Murray Equipment, Inc. (1993) Ind. App. 626 N.E.2d 537, 538:

> Once an issue is litigated and decided, the "law of the case" doctrine provides that the decision is settled and binding on the parties unless successfully challenged on appeal. Haskell v. Peterson Pontiac GMC Trucks, (1993), Ind. App., 609 N.E.2d 1160, 1162-1163 (after defendant's summary judgment motion denied, trial court denied plaintiff's subsequent motion for summary judgment and entered summary judgment in favor of defendant on same facts).

After reviewing the original Complaint and Third Complaint filed by the Plaintiffs, this court finds that the `law of the case' doctrine *is applicable* to paragraphs **A, B, C, D, E, F, I and J** of the *Prayer for Relief* stated in the Third Complaint.

The `law of the case' doctrine is ***not applicable*** to the ***Thirteenth*** *Cause of Action* of the Plaintiffs' Third Complaint. This Cause of Action addresses itself to the City-County Council and its alleged racial animus or lack of concern about the treatment of Afro-Americans (sic) within the Marion County criminal justice system. Nevertheless, as stated in this Court's "Order Granting All Defendants' Motions to Dismiss" issued on November 6, 1992:

> It is equally clear from a review of the law and an understanding of county

> government that the county council of each county has the duty, responsibility, authority and power to appropriate funds for the operation of the local unit of government. There is an intersection between the judiciary and the legislative branches of government when the courts require money for operation of the courts which includes payment for legal services for indigent criminal defendants. If the county council cannot or will not provide such funds there becomes a conflict which much [sic] be resolved. The case law and the trial rules of the State of Indiana provide the mandate by the court as a way of resolving this conflict.

Clearly, it is not the responsibility nor the duty of the City-County Council to ensure or supervise the proper treatment of any criminal defendants within the Marion County criminal justice system; that responsibility lies squarely upon the shoulders of the judiciary, both trial court and appellate. It is, however, the responsibility of the City-County Council to provide adequate funding so that reasonably sufficient services may be provided. If the executive or legislative branch of government, State or County, fails to perform its duty of providing sufficient funds to support the *judicial* system of indigent defense services (the *structure and function of which is the responsibility of the judiciary*), then it is incumbent upon the judiciary to mandate sufficient funds. If the trial court judiciary fall prey to same (sic) fiscal indecision and turmoil that seems to control the executive or legislative branch of county

or State government, then the appellate courts must point the way with a steady, yet firm, hand[2] (**Trial**

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[2] The inadequacy of the public defender system in Marion County, as alleged in the Complaint, is not a problem unique to Marion County. The criminal courts of this State, as in other States are faced with the monumental task of solving all of society's modern problems and dealing with its predators, violent offenders, drug abusers and sociopaths. The legislative branch of government, both State and Federal, in its zeal to quickly react to tragedy and human suffering, has [sic] passed increasingly punitive laws enhancing the punishments of criminal, yet has failed to provide the resources to fairly prosecute and incarcerate or rehabilitate or warehouse these offenders. The Indiana Department of Corrections is bursting at the seams with prisoners serving longer sentences, yet no action has been taken by the Legislature to build more prisons to house these new `lifers.' The legislative and executive branch of government want to sweep the problems of crime and punishment under the rug by enacting a plethora of new criminal laws, without having to face the fiscal reality and consequences of such a half-measure. The problems of the Marion County public defender system are merely symptomatic of a larger criminal justice system, both State and Federal, collapsing under its own weight.

The Plaintiffs, in their "Supplemental Pre-hearing Memorandum" cite the case of State vs. Peart (La. 1993) 621 So.2d 780. This case provides unique insight into how the State of Louisiana, and the Supreme Court of that State in particular, dealt with similar problems. In Peart, the Supreme Court of the State of Louisiana reversed the decision of a New Orleans Criminal District Court Judge. The District Court Judges, faced with an overburdened, underfunded indigent defense system, found LSA-R.S. 15:145, 15:146 and 15:304 [statutes enacted by the Louisiana Legislature to establish Louisiana's indigent defender system and indigent defender boards, not unlike statues recently enacted by the Indiana General Assembly], as well as the "system for securing and compensating qualified counsel" as a whole, unconstitutional. The Louisiana Supreme Court, perhaps sensing the

Court's footnote.) The Court therefore finds that the Plaintiffs' ***Thirteenth*** *Cause of Action fails* to state a claim upon which relief may be granted.

The 'law of the case' doctrine is ***not applicable*** to the ***Fourteenth*** *Cause of Action* of the Plaintiffs' Third Complaint. This cause of action, although not clearly stated, appears to challenge the constitutionality, under the separation of powers

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imminent collapse of this house of cards, found that the statutes were not unconstitutional and that the trial judge's remedies were inappropriate. Instead, the Supreme Court created a '**rebuttable presumption**' *that indigent defendants, in this particular judicial circuit, were receiving ineffective assistance of counsel, insufficient to meet constitutionally required standards.* Thus, the Louisiana Supreme Court in effect, stated that **all** indigent defendants convicted in this criminal circuit *were presumed* to receive ineffective assistance of counsel, thereby placing in jeopardy the validity of every single criminal conviction of indigent defendants within this judicial circuit within New Orleans Parish.

In a final 'warning' to the Louisiana Legislature, the Supreme Court stated: "If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel." 621 So.2d at 791. The common sense message is clear -- if you want tougher laws, more punishment, longer sentences . . . you have to be prepared to pay the price of protecting the basic rights of those you wish to throw to the wolves.

The dire situation faced by the criminal justice system, the citizens and the Legislature of the State of Louisiana is not unique. It is, however -- *prophetic*.

doctrine, of the creation of the Marion County Public Defender Board and the General Ordinance upon which it relies for its very existence. When viewed in light of paragraphs G and H of the *Prayer for Relief of* the Plaintiffs' Third Complaint, this count states a cause of action for, at least, declaratory relief. Although not specifically addressed by the Defendants in their Motions or oral arguments, it would appear that the Plaintiffs, as indigent defendants within the Marion County criminal justice system, have standing to bring such an action, as they are directly affected by the creation and function of the Marion County Public Defender Board.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the ***First*** through ***Thirteenth*** *Causes of Action* and paragraphs **A, B, C, D, E, F, I, and J** in the *Prayer for Relief* of the Plaintiffs' "Amended Complaint-Class Action" filed August 24, 1993, ***are dismissed, with prejudice. Accordingly, only the following party-Defendants are discharged:*** The State of Indiana; B. Evan Bayh, individually and as Governor of Indiana; The Consolidated City of Indianapolis and County of Marion; Stephen Goldsmith, individually; The Municipal Court of Marion County; The Superior Court of Marion County; The Marion County Public Defender Agency.

IT IS FURTHER ORDERED that the Plaintiffs shall prepare and file an Amended Complaint, ***clearly*** **and** ***succinctly*** **stating the facts and constitutional basis for their request for declaratory and/or injunctive relief as against the remaining Defendants**, within thirty (30) days of this date of this Order, or this action shall be dismissed, *in its entirety, with prejudice*. No further

Amendments to the Complaint by the Plaintiffs shall be permitted after this deadline.

July 8, 1994
DATE

/Signature/

Christopher L. Burnham,
Special Judge
Marion Superior Court
Civil Division, Room Five